88-1185

No. 88-

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM S. WALTERS, JR.,
Petitioner,

vs.

FIRST TENNESSEE BANK,
N.A. MEMPHIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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January 1989

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QUESTIONS PRESENTED

1. Whether Public Law 96-161, December 28, 1979, 93 Stat. 1237-1238, §205 (codified at 12 U.S.C. §86a), 1240 §213; Public Law 98-221, March 31, 1980, 94 Stat. 164, §512, 168 §529; and Public Law 96-399, October 8, 1980, 94 Stat. 1648 §512 (the latter two being amendments to the former) violated the Constitution of the United States, Amendment 5 (for the same reasons Article 1 §10 prohibits state action doing the same), facially and as applied, as an unlawful impairment of contract.

2. Whether it is possible for a national bank, by an interest overcharge, to breach a contract to loan money unless the overcharge is done with requisite knowledge to constitute a violation of 12 U.S.C. §86 prohibiting usurious overcharges by national banks.

3. Whether the requisite knowledge for a national bank to violate 12 U.S.C. §86 is knowledge specifically possessed by a specifically identified human agent deliberately acting for the national bank designedly overcharging a borrower or is general knowledge of the national bank as an entity whereby the entity is charged with knowledge of its actions irrespective of whether any agent, individually considered, possessed the knowledge.

4. Whether a mistake of fact, other than a scrivener's error or a mathematical miscalculation, is assertable by a national bank as a defense to what, otherwise, would be a usurious overcharge under 12 U.S.C. §86.

5. Whether the knowledge on the part of a national bank requisite to a finding that an interest overcharge by a national bank violates 12 U.S.C. §86 is general knowledge or is specific intent-type knowledge.

6. Whether the $25,000 charge by respondent collected from petitioner for 208 days of interest calculated at a rate in excess of the maximum allowed by the law of Tennessee was the result of a mistake of law by respondent.

7. Whether the intent required to violate 18 U.S.C. §1341 (mail fraud statute) is a general intent to defraud or a specific intent to defraud.

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William S. Walters, Jr. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A1-24) is reported at 855 F.2d 267. The opinion (App. A31-45) of the district court is not reported.

JURISDICTION

The judgment of the court of appeals (App. A1-24) was entered on August 16, 1988. A petition for rehearing by the court of appeals was denied on October 14, 1988 (App. A59). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The United States Constitution, Article 1 §10, in pertinent part, provides: (See Appendix)
2. The Constitution of Tennessee, Article 1 §20, in pertinent part, provides: (See Appendix)
3. The United States Constitution, Amendment 5, in pertinent part, provides: (See Appendix)
4. The Constitution of Tennessee, Article 11 §7, in pertinent part, provides: (See Appendix)
5. Tennessee Code Annotated §47-14-103(2) (1979) provides: (See Appendix)
6. In pertinent part, 12 U.S.C. §85 provides: (See Appendix)
7. In pertinent part, 12 U.S.C. §86 provides: (See Appendix)

8. In pertinent part, 12 U.S.C. §86a provides: (See Appendix)
9. In pertinent part, Public Law 96-161, December 28, 1979, 93 Stat. 1240 §**213** provides: (See Appendix)
10. In pertinent part, Public Law 96-221, March 31, 1980, 94 Stat. 164 §**512** provides: (See Appendix)
11. In pertinent part, Public Law 96-221, March 31, 1980, 94 Stat. 168 §**529** provides: (See Appendix)
12. In pertinent part, Public Law 96-399, October 8, 1980, 94 Stat. 1648 §**512** provides: (See Appendix)
13. In pertinent part, 18 U.S.C. §1341 (1976) provides: (See Appendix)
14. In pertinent part, 18 U.S.C. §1961 provides: (See Appendix)
15. In pertinent part, 18 U.S.C. §1962 provides: (See Appendix)

STATEMENT

On May 3, 1979, petitioner, an individual, made a $475,000 business loan from respondent, a national bank (App. A4). The contract governing the loan terms was evidenced by a written promissory note (App. A115).

After receiving the recapitulation from respondent as requested, on May 28, 1982, petitioner filed his complaint because of the alleged overcharging of interest (App. A72). A declaratory judgment was requested to adjudge what the term "prime rate," used in the loan contract, meant. Additionally, petitioner alleged that respondent was liable for common law misrepresentation with respect to what the base interest rate used to calculate and charge petitioner interest was, and claimed that respondent (1) breached the loan contract by overcharging contractually agreed interest; (2) breached the confiden-

tial relationship between petitioner and respondent in that petitioner vested confidence in respondent to calculate the correct amount of interest using correct information known only (App. A72) to respondent. Petitioner, additionally, charged respondent with violation of 18 U.S.C. §1962(a) and (c) and sought relief under 18 U.S.C. §1964(c) alleging "prime rate fraud" familiar to the Court from *American National Bank And Trust Company of Chicago v. Haroco, Inc.*, 473 U.S. 606 (1985).

The allegation is that respondent designedly set about to overcharge interest to its prime-plus business borrowers. The district court directed a verdict with respect to petitioner's breach of contract and breach of confidential relationship claims without specification as to what prompted the directed verdict (App. A34-35).

The district court directed a verdict against petitioner dismissing the common law misrepresentation (App. A82-83) claim and the prime rate fraud claim.

The rulings of the district court with respect to the usury claims require a bit more explanation. The sequence of events, with special emphasis on the days and the years of those events, complicate the usury situation. It is important to note that there is no factual dispute with respect to how much interest was charged and collected nor that the amount of interest collected, in toto, exceeded the total amount of interest permitted by governing law, irrespective of various amendments to the law which interceded at various times.

The subject loan was made on May 3, 1979. The governing law with respect to the maximum amount of interest chargeable was that codified in TCA §47-14-103 (2) (1979) and 12 U.S.C. §85. The contract which fixed the terms of the loan explicitly incorporated these statutory provisions (infra p. 9).

Under the governing statutes on May 3, 1979, it is undisputed that there existed no law nor facts which would permit respondent to charge or collect from petitioner interest at a rate greater than 18%. Further, it is undisputed that there were gaps of time during which the maximum amount which respondent could charge was less than 18%. Finally, it is undisputed that there were 37 days between May 1980 and October 1980 on which respondent collected from petitioner interest at a rate greater than the maximum permissible under the indisputably governing law.

On December 28, 1979 (almost 8 months after petitioner's loan was made, Congress enacted 12 U.S.C. §86a. In short, this statute, for loans like the subject loan, preempted certain (but did not preempt other) state laws fixing usury ceilings for national banks. Section 213 of §86a has never been codified but explicitly postponed the applicability of §86a in states, such as Tennessee (App. A64-65), which had constitutional provisions regarding maximum interest rates, until July 1, 1981.

However, on March 31, 1980 (App. A65) and October 8, 1980 (App. A66), Congress amended 12 U.S.C. §86a, and these amendments are the basis for a dispute between petitioner and respondent with respect to how, if at all, respondent (1) was relieved from the loan contract and, if relieved (2) could constitutionally charge more interest than the contract, standing alone, would have allowed (App. A78, A97-104). This dispute exists based on undisputed facts (App. A69-70) and is a pure law question.

The critical importance of the question at hand, likewise, proceeds without factual dispute (App. A69-70). That is, indisputably, between December 1980 and mid-November 1981 respondent collected approximately $25,000 in interest over and above the amount which could

have been collected unless the amendments to §86a passed by Congress on March 31, 1980 and October 8, 1980 permitted respondent to collect more interest than could be collected at the rate of 18%. The decision of respondent to exact interest at a rate in excess of 18%, indisputably (App. A98-104), was based on an interpretation of law by respondent's counsel. There exists no dispute (App. A69-70) that, if respondent's interpretation of the law was a mistake, interest collected over 18% constituted indefensible usury.

The action (App. A32-45) of the district court relative to the usury claims is now in context. Petitioner claimed that, if the March 31, 1980 and October 8, 1980 amendments to §86a were applicable to the loan (which predated §86a) so as to allow respondent to deviate from the loan contract, the March 31 and October 8, 1980 amendments were unconstitutional impairments of contract.

The district court first ruled (App. A50-51) that the §86a amendments did not apply to the interest charges in question; therefore, the interest ceiling was 18%. Based on this ruling, it became indisputable that the 208 days from December 1980 through November 1981 on which respondent collected interest in excess of 18% amounted to usury. However, on reconsideration, the district court reversed itself (App. A73) and, with no discussion, dismissed (App. A78) petitioner's claim that, if applied to the subject loan, §86a would amount to an unconstitutional impairment of contract.

With respect to the undisputed overcharges on the 32 days between May and October 1980, the district court found that there was a factual dispute with regard to whether those overcharges were "knowingly" exacted. If "knowingly" collected, the overcharges were violations

of indisputably controlling law, i.e., §86 (this was pre-§86a), and, as such, usurious.

The jury was instructed with respect to the word "knowingly" (App. A46-48, A57-58). The instruction is consistent with knowledge required on the part of one acting with a general (as opposed to a specific) intent to do that which was done. The jury returned a verdict finding that respondent overcharged with requisite knowledge dictating liability for usury (App. A48).

Eighteen months after the jury's verdict that respondent acted with requisite knowledge, the district court ruled (App. A32-45), germane to the instant petition, reversing the jury's verdict and granting a JNOV (App. A25-26). The district court premised its reversal on: (1) that, effectually, petitioner had the burden of proving by a preponderance of the evidence the negative that the admitted overcharges were *not* a result of a mistake of fact and (2) petitioner did not refute the testimony of the executive of respondent that the overcharges were mistakes of fact and, therefore, failed to carry his burden to prove that the overcharges were "knowingly" made.[1]

The court of appeals affirmed the district court (App. A1-24). Isolating the language from the published opinion of the court of appeals which has bearing on this petition, the Court's attention is drawn to certain determinative language:

---

1. Respondent had argued before the jury and in post-trial motions what became known as its "undercharge" theory. Essentially, respondent claimed that it had undercharged petitioner during the same period when it had overcharged petitioner. This was advocated to be evidence of mistake and was presented to the jury for its consideration in determining whether respondent had "knowingly" overcharged. In its memorandum opinion (App. A32-45), the district court ruled that the undercharge theory of defense was legally impermissible. Respondent did not appeal nor cross-appeal from any aspect of the ruling of the district court, including the district court's determination that the undercharge theory of defense could not be made.

[W]alters failed to prove that the excess interest charge was knowingly charged. The only testimony on the issue was from the Bank's witness, . . . who admitted two periods of overcharges, but who testified that they . . . were inadvertent errors due to manual programming oversights. Walters presented no contradictory evidence tending to show that the *overcharges* were anything but *the result of* **negligence** (App. A8; see also A75). . . . [i]mplicit in this standard is that an honest mistake of fact, e.g., a mistake in computation, is not usurious (App. A12).

[W]alters presented no evidence of intent. The only evidence . . . was provided by the affidavit . . ., submitted to support the Bank's motion for summary judgment. In that affidavit, Mr. Dudley thoroughly and concisely explained how the overcharges and undercharges occurred. * * * [D]udley attributed the **errors** solely to **negligence** and **inadvertence** (App. A12).

In response, Walters presented no evidence tending to show that the **Bank acted** other than **negligently** or by mistake (App. A13). (emphasis added)

* * *

[d]istrict court properly rejected the jury's verdict for Walters and entered judgment NOV. The only testimony at the trial regarding the Bank's overcharge was that of Mr. Dudley. * * * [t]his evidence . . . at most **established negligence** on the part of the Bank, Walters presented no contradictory testimony or evidence. * * * However, this argument only permits one to conclude that the **Bank** was **negligent.** Viewing the case in a light most favorable to Walters, and drawing all reasonable inferences in his favor, there simply was an absence of proof of knowing

conduct by the Bank, an essential of usury under 12 U.S.C. §86 which Walters had the burden of proving 'convincingly.' (App. A23).

On the prime rate fraud question, the court of appeals stated:

> In order to state of valid RICO claim, a plaintiff must prove that the defendant committed an illegal predicate act. *See* 18 U.S.C. §1962. Walters relied on the federal mail fraud statute, ... [A]s stated by this court in *Bender v. Southland Corp.*, 749 F.2d 1205 (6th Cir. 1984):
>
> > [T]he crime of mail fraud has two elements: a scheme or artifice to defraud and a mailing for the purpose of executing the scheme. * * * This court has held that the scheme to defraud must involve:
> >
> > > [*I*]*ntentional* fraud, consisting in deception *intentionally* practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed. [*A scheme to defraud*] *requires intent to deceive or defraud.* (citations omitted) This court has also held that the scheme to defraud must involve 'misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension.' (citations omitted)
>
> There was no evidence that the Bank published a false rate. * * * Finally, there was no evidence that the Bank ever represented that the prime rate would be the lowest rate. . . . [t]here simply was an absence of proof of an intent to defraud, deception, or misrepresentations or omissions reasonably calculated to

deceive Walters as required for mail fraud (App. A14-17).

With respect to the breach of contract claim, i.e., that the overcharging of interest by respondent, if not usurious, was a breach of the loan contract, was addressed as follows:

> Walters also advanced the argument that even if the collection of interest in certain instances was not usurious, it nonetheless breached the contract because the maximum interest rate under his promissory note was limited by the usury laws in force as of May 3, 1979, the date he obtained the $475,000 loan and not as of the date the interest was collected. The plain language of the note is contrary to Walters' interpretation:
>
> > [p]rovided, always, however, that notwithstanding any changes in said prime rate, the *rate of interest hereon prior to maturity shall never be more than the maximum lawful contract rate which a national bank, having its principal place of business in the State of Tennessee, may lawfully charge* **from time to time** . . . [a]nd, accordingly, in no event and upon no contingency shall the bank ever be entitled to receive, collect or apply as interest any interest . . . in excess of the maximum contract rate which may, **from time to time,** be lawfully charged to the maker hereof under the applicable law by a national bank having its principal place of business in the State of Tennessee. (emphasis theirs).
>
> Clearly, the Bank was not limited by the maximum rate in effect on the day of signing, but could charge interest limited by the rate ceiling and usury laws in

effect as they changed **from 'time to time.'** (App. A18-21).

With respect to whether §86a and its amendments, if applied to the subject loan, amounted to an unconstitutional impairment of contract, the court of appeals stated:

> [5] . . . : [I]nsofar as Walters argues that this federal legislation, which preempted state usury ceilings and granted interest rate relief to banks during and after 1980, constitutes an unconstitutional impairment of the contract, we note that no court has ever declared these statutes unconstitutional. Moreover, the contract Walters signed expressly contemplated that the interest rate charged and allowed by law would or could fluctuate **from 'time to time,'** which negates his contention that the rate in effect on the date of signing of the contract was the maximum rate that could ever be charged (App. A22).

With respect to whether §86a and its amendments were even applicable to the subject loan, the court of appeals refused to review the contention with the following (factually erroneous) words:

> [5] Walters superficially challenges the district court's construction of Pub. L. No. 96-221 and Pub. L. No. 96-399 in its appellate brief by simply referencing its trial memorandum (App. A21-22).

In the petition to rehear before the court of appeals, petitioner detailed how and why an observation that the challenge of petitioner was "superficially" made was incorrect and that everything petitioner wished to be considered, in fact, appeared in the four corners of petitioner's reply brief (App. A105-111). In short, petitioner, in its opening brief, did nothing more than draw attention to the fact that petitioner did not concede, in

the district court, that the subject statutes were applicable but contended (App. A74) to the contrary and made his position known to the district court in writing. However, in respondent's answering brief, respondent devoted ten pages (App. A96-104) in an effort to convince the court that the subject statutes were applicable and governed, essentially attempting to refute any mistake of law contention.

REASONS FOR GRANTING WRIT

It is notable that this Court, since 1959, has addressed the subject of the federal usury law only once and, then, only restated that the usury ceiling for national banks is that of the state in which the bank is "located." However, the specific question at hand in that case was one not pertinent to the instant inquiry, i.e., what the word "located," used in 12 U.S.C. §85 means. *Marquette National Bank of Minneapolis v. First Omaha Service Corporation*, 439 U.S. 299 (1978). There remain questions with respect to federal usury laws which are of universal impact on the economy. These questions involve billions upon billions of dollars of transferred gross national product on an annual basis.

In 1979, the Nation was faced with what was stated to be an economic crisis directly related to the interrelationship between interest rates and inflation. The banking community brought to bear all of the clout it could muster on Congress demanding excusal from usury laws. The result was the enactment of 12 U.S.C. §86a by which Congress, carte blanche, zapped out of existence state statutes and constitutional provisions relating to usury ceilings.

The legislative history (S. Rep. No. 96-368, 96th Cong., reprinted in 1980 U.S. Code Cong. & Admin. News

236; 125 Cong. Rec. 29,911, 30,610, 31,309-31,310, 31,320-31,327 (1979); 126 Cong. Rec. 6,965-6,984, 7,062-7,074 (1980); S. Rep. No. 96-736, 96th Cong., reprinted in 1980 U.S. Code Cong. & Admin. News 3506; 126 Cong. Rec. 16,112, 22,668 (1980); S. Rep. No. 96-423, 96th Cong., reprinted in 1980 U.S. Code Cong. & Admin. News 2584; 125 Cong. Rec. 35,267-35,268, 36,394-36,397, 36,404-36,405, 36,613-36,616, 36,903-36,906) of §86a reveals a situation where Congress acted at almost a panic pace. What is particularly revealing is that even Congress expressed serious doubt with respect to the constitutionality of §86a and its amendments but passed it anyway. Presumably, the thought was that, if the laws are unconstitutional, the courts will swiftly react, and Congress can adjust accordingly. As it turned out, there is no evidence that any court ever reviewed or passed on the constitutionality of §86a or its amendments. When the court of appeals below noted that no court had ever declared the statutes to be unconstitutional, it failed to mention that there is no evidence that any court ever even considered the question.

The areas of constitutional concern to Congress were of no small moment. The first (and most talked about) involved whether it was within the power of Congress to so summarily reduce to nothingness state laws and state constitutional provisions. The less talked about but equally pressing question involved what right Congress had to so summarily reduce to nothingness valid and existing contracts between borrowers and lenders.

When Congress passed §86a, it showed special deference to state constitutional provisions by postponing the applicability of the preemption legislation in states where constitutional provisions governed interest rate ceilings (App. A62-63). Also, as initially enacted, §86a preempted

state statutes only prospectively and, thereby, avoided the impairment of contract problems (*id.*). However, in March and October 1980, Congress enacted amendments to retrospectively apply §86a to loans initially made prior to its passage.

The claim of petitioner that the amendments to §86a were not applicable to the subject loan rests solely on the fact that respondent is located in Tennessee, and Tennessee was/is a state where the maximum rate of interest is controlled by a constitutional provision. *Tennessee Constitution,* Article 11 §7. Because loans made by national banks located in such states were treated differently from loans in states where no such constitutional provisions existed, petitioner has always contended (App. A89-93) that proper interpretation of the amendments to §86a exclude the subject loan.

If petitioner is correct, there exists no further question with respect to the $25,000 interest charge over and above what otherwise concededly would have been the usury ceiling. The district court first ruled with petitioner and then against petitioner on the statutory interpretation question, and the court of appeals simply refused to address the subject. There is no precedent.

The thought that, since the questioned legislation has expired itself out of existence, there could be no question of sufficient magnitude to require this Court's attention dissipates under examination. There is no assurance that the economy will not, again, be visited by the economic terrors of inflation with another interest rate "crisis." In fact, the fear is ever-present and based on reality. There is hardly doubt that Congress will be pressured, someday, by the banking industry for repeal of usury ceilings. Considering the options available to Congress in the next "crisis," the natural inclination will be to use the unre-

viewed statutes represented by §86a and its amendments. Though Congress recognized that §86a, as amended, was constitutionally dubious, it has survived to now without judicial review.

Upon passage of §86a and its amendments, untold billions of dollars were forcefully transferred from the Nation's business and agricultural borrowers to the Nation's business and agricultural lenders.

Arguably, the reason for no judicial review of legislation like §86a and its amendments is that the most directly and negatively impacted part of society is the small business borrower, and he is the most directly dependent on banking relationships for survival. Therefore, as long as such a borrower continues to exist, particularly in a tenuous economy, legal action against his lender is out of the question. Additionally, the small business borrower who is economically crushed is in no condition to seek relief against his lender and, as far as there ever being a future for such a small business borrower, he tends to fear, with reason, that an action against his lender would make impossible any opportunity to establish an essential line of credit necessary to re-establish a new business in better times. Because of these practicalities, the system for judicial review of constitutionally infirm legislation such as §86a experiences break down.

The likelihood that there is (or ever again will be) in the judicial review pipeline, at this stage, any case other than the present one which would present this Court with opportunity to review the constitutional soundness of §86a and its amendments, as an obvious matter of practicality, is remote. Yet, whether or not §86a and its amendments stand as constitutionally permissible solutions to an interest rate "crisis" or not is a question which has immense ramifications of **present** extreme importance.

For example, the lurking possibility that a business borrower might again face a statute like §86a and its amendments is of considerable importance in a small business borrower's **present** decision with respect to how much to borrow and under what terms and conditions. Likewise, knowledge on the part of business borrowers and business lenders today that the solution evidenced by §86a and its amendments cannot be re-effectuated because of constitutional provisions can markedly shape **present** lending practices.

Perhaps of even more importance, however, is the entitlement of the general public which must exist in the context of prevailing economic conditions to have Congress rightly informed by this Court the next time it faces the necessity to address an interest rate "crisis."

There is a uniqueness about this opportunity to review which makes it particularly appropriate as the vehicle by which this Court should speak. That is, statutes of limitation have run on any similar claims which, perhaps, could have been made in years passed. Therefore, were this Court to rule that §86a and/or its amendments failed to meet constitutional standards, the salutary effects (no matter which way this Court ruled) of such a ruling could be felt prospectively without disruption of existing contracts.

The court of appeals latched onto the **"from time to time"** language in the loan contract as its basis for holding that petitioner agreed that the maximum chargeable interest was the maximum the law allowed, on the date of *collection* rather than the date on the contract. This reasoning supports the conclusion that, even if §86a and its amendments created an unconstitutional impairment of some contracts, it did not impair the subject contract.

Respectfully, this reasoning errs in that it lifts language out of context and gives it a meaning which, when read in context, has a materially different meaning. The loan contract explicitly incorporates, by reference, 12 U.S.C. §85 (pre-amendment) and the Tennessee statute which §85 adopts, by reference, creating an 18% usury ceiling. All §85 does is state that the maximum amount chargeable is the maximum allowable under the Tennessee law.

By this language, petitioner contracted, on May 3, 1979, that respondent would never charge a rate in excess of the usury ceiling fixed by Tennessee. But, Tennessee law never changed; thus, there never existed a time when, according to the loan contract, respondent could charge petitioner more than 18%.

While the language might have anticipated some change in the maximum allowable rate, it was a change in Tennessee law enacted by the Tennessee General Assembly. It defies all reason to suggest that petitioner, on May 3, 1979, agreed that, if federal law intervened to obliterate the Tennessee law, petitioner would, then, be contractually bound by whatever Congress might enact.

Further attention to the context of the "from time to time" language yields an even more plausible meaning. That language appears in that part of the contract known as the self-protection clause by which respondent seeks to protect itself from ever being considered to have intended to enter into a usurious contract. The object of the language is to give respondent an out if it collects more interest than the law permits. Respondent protects itself by contracting, in advance, that it never intends, in the future, to collect more than the law might allow "from time to time" and that, if respondent does collect more, it can contractually substantiate an argument that, in so

doing, it did not intend so to do. The district court ruled that the self-protection language was unenforceable (App. A41-44). From this ruling, respondent neither appealed nor cross-appealed.

A somewhat subtle yet, upon study, clearly discernible ruling of the court of appeals constitutes law previously unknown to American jurisprudence and which upsets law at its most fundamental level. This ruling involves the 32 days of overcharges which the jury determined to have been knowingly exacted. That these were collections at a rate greater than permitted by governing law was admitted and is uncontestable. While the court of appeals affirmed the district court in overruling the jury's verdict that these charges were "knowingly" exacted, the court of appeals repeatedly stated that the overcharges were the result of respondent's negligence (supra p. 7).

There could hardly be any more sure violation of the terms of the loan contract than for respondent to collect an amount greater than respondent explicitly promised (App. A115) it would collect based on information known only to respondent (App. A72). There is no dispute that respondent did just that. This overcharge is a classic breach of contract, and nothing more need be asked.

Whether the overcharge was "knowingly" or inadvertently done could hardly be less material to whether there had been a pure and simple breach of the contract. The court of appeals repeatedly stated that the overcharge was the result of negligence. To negligently breach a contract certainly must be more egregious than to non-negligently breach a contract.

Without authority, the court of appeals ruled that the only way a national bank can be liable for breach of a loan contract, by overcharging interest, is to be guilty of "knowingly" overcharging. The court of appeals has ruled that

national banks are excused from the common law remedy of breach of contract, if the contract is a loan agreement and the breach is accomplished by collecting more interest than the national bank promised it would collect.

While a breach of contract by a lender overcharging interest does not yield to the borrower the statutory penalties for a usurious overcharge, damages as well as contract termination remedies afforded by the common law for breach of contract are of no small importance. However, by the ruling of the court of appeals, national banks are given license to overcharge interest in violation of a loan contract without being responsible for damages and without jeopardizing continuation of the loan contract so long as the lender can produce a witness to say that the overcharging, though it may have been repeated on more than thirty different occasions, was merely the product of negligence.

Though this Court has stated in dictum, which has become accepted as law, that interest overcharges because of the bank's erroneous, albeit good faith and plausible, interpretation of the law [as is equally true in other areas of the law: *United States v. Powell,* 513 F.2d 1249, 1251 (8th Cir. 1975); *United States v. Wood,* 446 F.2d 505, 507 (9th Cir. 1971); *United States v. Thaggard,* 477 F.2d 626, 631-632 (5th Cir. 1973)] will not excuse resultant usury [*The Bank of the United States v. Waggener,* 9 L.Ed. 163 (1835); *Lloyd v. Scott,* 7 L.Ed. 833 (1830), both of which are cases to determine whether the transactions were or were not "loans"] and although this Court has ruled that it is impossible for an overcharge of interest to be excused as *de minimis non curat lex* [*Citizens National Bank of Kansas City v. Donnell,* 195 U.S. 369 (1904) where $14.51 was overcharged on a $20,000 loan; see also *McCollum v. Hamilton National Bank,* 303 U.S. 245, 247 (1938)] and although this

Court has recognized the statutory provision that an interest overcharge must be "knowingly" exacted in order for usury to exist, this Court has never explicitly ruled with respect to the quality of the required knowledge.

It would seem that the explicit holding of this Court in *Lloyd v. Scott,* supra, that usury is a *malum prohibitum* act would leave beyond further inquiry whether the knowledge required was of a general or a specific kind [*United States v. Freed,* 401 U.S. 601, 607 (1971); *United States v. Dotterweich,* 320 U.S. 277 (1943); *United States v. Baliant,* 258 U.S. 250 (1922); *United States v. Park,* 421 U.S. 658, 668-674 (1975)] the courts below apparently overlooked the implication.

The knowledge requirement utilized below imposes a standard which makes it necessary to find that, not only did respondent do what it did knowing that it had done it, but for the lender to additionally know that doing what it knew it had done was usurious. This approach to the knowledge requirement of §86 reduces to meaninglessness the pronouncements by this Court explicitly holding that usury is a *malum prohibitum* act and that the usury risks of the consequences of conduct knowingly engaged in by the lender remain squarely with the lender.

The law concededly recognizes an honest mistake of fact as negation of requisite knowledge to violate §86. But, the law has been extremely careful to circumscribe what constitutes an "honest mistake of fact" because to allow the mistake of fact defense to become a catch-all would reduce to effective nothingness the exceedingly important precept that usury is a *malum prohibitum* act. If unguarded, the "honest mistake of fact" defense, though traveling under a different name, becomes, *in esse,* the fast track to a specific intent requirement which converts usury from a *malum prohibitum* act to a *malum in se* act.

A leap of this magnitude completely flips all established law, and the order of things protected by it, on its head.[2]

As indicated by the authorities in footnote 2, the honest mistake of fact which the law has taken pains to avoid expanding is of two kinds which have been dubbed as (1) a scrivener's error and (2) a mistake in computation. The **scrivener's error is** one where correct information is known and intended to be recorded but, without any knowledge of having so done, incorrect information is recorded and, because of the incorrect information, more is charged than was intended to be charged. The **computation error is** one where, intending so to do, the right numbers are recorded but, without any knowledge that such has been done, the wrong total, product or quotient is calculated, e.g., a "2" is rightly recorded to be added to a "3" which has been rightly recorded but, without the knowledge of the lender, the rightly

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2. The following is a list of citations, from among hundreds available, selected because of the discussion in each articulating clearly each aspect of the general law on the subject:

Consumer Usury and Credit Overcharges, (National Consumer Law Center) §2.2.6 pp. 10-11; 47 *C.J.S.*, Interest and Usury, §120, p. 223; 14 *Williston, Contracts* (1972 Ed.) §698 pp. 795-801; Comyn, *Law of Usury* p. 7; *Dickey v. Bank of Clarksdale*, 184 So. 314, 317 (Miss. 1938); *Vee Bee Service Co. v. Household Finance Corporation*, 51 N.Y.S.2d 590, 611 (N.Y. S.Ct. 1944); *Muir v. Newark Sav. Inst.*, 16 N.J.Eq. 537, 539; *Ford Motor Credit Co. v. Catalini*, 383 S.W.2d 99, 101 (Ark. 1964); *Holland v. Doan*, 307 S.W.2d 538, 540 (Ark. 1957); *Jefferson Standard Life Ins. Co. v. Davis*, 163 So. 506, 507 (Miss. 1935); *Hebron Bank v. Gambrell*, 77 So. 148, 149 (Miss. 1918); *Atlas Realty Corporation v. House*, 192 A. 564 (Conn. 1937); *Fisher v. Bethesda Discount Corporation*, 157 A.2d 265, 269 (Md. App. 1960); *Cotton v. Commonwealth Loan Co.*, 190 N.E. 853, 856 (Ind. 1934); *Pyler v. McGee*, 57 S.E. 57, 58 (S.C. 1907); *Rossberg v. Hosesapple*, 260 P.2d 563, 566 (Utah 1953); *Lloyd v. Scott*, 7 L.Ed. 833, 839 (1830); *Dupree v. Virgil R. Coss Mortgage Co.*, 267 S.W. 586, 589 (Ark. 1925); *Kessing v. National Mortgage Corporation*, 180 S.E.2d 823, 827-828 (N.C. 1971); *Dreyfus Company, Inc. v. Tim Wargo and Sons, Inc.*, 668 S.W.2d 957 (Ark. 1984); *Teshner v. Roome*, 212 P. 473, 475 (Ore. 1923).

recorded numbers are totalled to be "6." No other types of mistake have ever been recognized as sufficient to negate a finding of requisite knowledge. The most probative evidence that an overcharge is not a mistake has been held to be failure to make a correction when the overcharge is brought to the lender's attention (App. A79-80). *Holland v. Doan,* 307 S.W.2d 538 (Ark. 1957).

Perhaps the most illustrative clarification of the differentiation can be found in *Ford Motor Credit Company v. Catalini,* 383 S.W.2d 99, 100-101 (Ark. 1964). There, the responsible employee added the figures put down but claimed mistake of fact because he inadvertently selected the wrong chart from which to obtain the numbers written down. It was not contested that the clerk intended to use the right chart or that the mistake in selecting the wrong chart was not one made in good faith. The court found that the mistake in that case was not a mistake of the kind required in order to excuse the overcharge from classification as usury and discussed what it takes to be an excusing mistake.

The reason underlying the ruling in *Catalini* is that the numbers intended to be written down were knowingly written down (i.e., there was no scrivener's error) and, once written down, the numbers were correctly combined and, accordingly, the right mathematical result was reached using numbers knowingly intended to be used in calculating (i.e., there was no mathematical calculation error). The type of errors claimed by the lender and rejected by the court in *Catalini* as insufficient to excuse a finding of usury are precisely the kind of errors accepted by the courts below as sufficient to excuse a finding of the requisite knowledge to violate §86.

The policy implications of the rulings of the courts below are quite significant. In short, the rulings **shift to**

the borrower all of the risk of being overcharged interest because the lender has chosen to operate understaffed, with incompetent employees, with inadequate equipment or with outdated systems relative to the workload demands. There is a very real sense in which, under the precedent set by the rulings below, a borrower, before being able to make an intelligent borrowing decision, must be fully advised of not just what the lender charges as interest but of the competence of the lender's personnel and adequacy of the lender's systems.

This is of critical importance in modern times when business borrowing customarily is by use of a fluctuating interest rate which varies according to a standard (e.g., the prime rate of the lender) which is known only (App. A72) to the lender. If the ruling of the courts below is acceptable precedent, courts will be required to re-evaluate rulings explaining the statutory provisions in the Truth-In-Lending Act [15 U.S.C. §1601 et seq.], where the lender/seller retains full responsibility for mistakes similar to those held below to excuse overcharged interest.[3] The rationale in those cases could hardly be more applicable to the present subject. From a societal standpoint, it would be unwise to remove the pressure of present law which forces national banks to be efficient or fail so to do at their own **risk** which the law will not permit to be **shifted** to a helpless small business borrower.

Another error in the ruling below has major society-wide impact, reversing all known law on the subject and

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3. *Ratner v. Chemical Bank New York Trust Co.*, 329 F. Supp. 270, 279-282 (S.D.N.Y. 1971); *Buford v. American Finance Co.*, 333 F.Supp. 1243, 1247-1248 (N.D. Ga. 1971); *Ives v. W.T. Grant Co.*, 522 F.2d 749, 757-758 (2nd Cir. 1975); *Johnson v. Associates Finance, Inc.*, 369 F.Supp. 1121, 1123 (S.D. Ill. 1974); *Palmer v. Wilson*, 502 F.2d 860, 861 (9th Cir. 1974); *Welmaker v. W.T. Grant Co.*, 365 F.Supp. 531, 544 (N.D. Ga. 1972); *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1165-1167 (7th Cir. 1974); *Baker v. G.C. Services Corp.*, 677 F.2d 775, 779 (9th Cir. 1982).

reducing to effective nothingness a rule of universal application, but one which this Court is yet to directly address. The courts below excused respondent, a multi-billion dollar national bank, **as an entity** because they considered that petitioner had failed to identify a specific individual who, while acting as an agent for respondent, possessed what they considered sufficient knowledge and/or intent for those individuals to have had personal liability had those been persons responsible under the law and had been individually charged (supra p. 8; App. A41-42).

Where the knowledge and/or intent of an entity, **as an entity,** must be determined, the question is not whether, or what, any particularly identified individual within the entity knew and/or intended but what the entity knew and/or intended. Even an acquittal or specific finding of no wrongdoing by the employee who engaged in the conduct does not insulate the entity from even criminal liability.[4]

The relevant knowledge of respondent is the collective knowledge of all of its employees and the content of its records. The fact that no one individual agent of respondent has a sufficient quantum or quality of knowledge to have supported culpability, were there no other knowledge, is irrelevant.[5] Continuous conduct, established as a

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4. *United States v. American Stevedores, Inc.*, 310 F.2d 47, 48 (2nd Cir. 1962), cert. denied, 371 U.S. 969 (1963); *United States v. Young Brothers,* 728 F.2d 682, 688 (5th Cir. 1984); *American Medical Association v. United States,* 130 F.2d 233, 252 (D.C. Cir. 1942), aff'd, 317 U.S. 519 (1943); *United States v. General Motors Corporation,* 121 F.2d 376 (7th Cir. 1941), cert. denied, 314 U.S. 618 (1941); *United States v. Austin-Bagley Corp.,* 31 F.2d 229, 233 (2nd Cir. 1929), cert. denied, 279 U.S. 863 (1929).

5. *United States v. T.I.M.E.-D.C., Inc.,* 381 F.Supp. 730, 740-741 (W.D. Va. 1974); *Inland Freight Lines v. United States,*

(Continued on following page)

course of the business, is a sufficient basis to irrebuttably presume that corporate officers were informed.[6]

A misrepresentation by an entity agent who lacked even a reason to believe that what was represented was not, in fact, true leaves the entity liable if, within the ken of the entity, there exists information which would make the representation a knowing misrepresentation.[7] Because the court below made much of the fact that individuals within respondent "believed" (App. A84) what they were doing was "right," it should be noted that prior authority reduces this "belief" to an irrelevancy.

In *Slater v. Missouri Edison Company*, 245 S.W.2d 457, 460 (Mo.App. 1952), it was conceded that the trespassing agent of the corporation "believed" that the property on which he traversed was owned by the corporation. The court held that this is no defense. The corporation's "honest mistake" defense was rejected because there were other employees of the corporation who knew. The fact that an employee acts on an honest belief that what he does is permissible does not mean that his corporate employer gets the advantage of the good faith belief.

Footnote continued—

191 F.2d 313, 315 (10th Cir. 1951); *United States v. Sawyer Transport, Inc.*, 337 F.Supp. 29, 30-31 (D. Minn. 1971), aff'd, 463 F.2d 175 (8th Cir. 1972); *Alabama Power Company v. McIntosh*, 219 Ala. 546, 551, 122 So. 677, 681 (1929).

6. *People v. Canadian Fur Trappers Corporation*, 248 N.Y. 159, 161 N.E. 455, 458 (1928); *Grant Brothers Construction Company v. United States*, 13 Ariz. 388, 114 P. 955, 957 (1911), aff'd, 232 U.S. 647 (1914); *American Socialists Society v. United States*, 266 F. 212 (2nd Cir. 1920), cert. denied, 254 U.S. 637 (1920).

7. *Gem City Motors, Inc. v. Minton*, 109 Ga.App. 842, 845, 137 S.E.2d 522, 525 (1964); *Paloeian v. Day*, 299 Mass. 586, 591, 13 N.E.2d 398, 401 (1938); *Sarna v. American Bosch Magneto Corp.*, 290 Mass. 340, 343, 195 N.E. 328, 330 (1935).

Given public policy,[8] the law tilts the scales in favor of the public welfare. *Shirley v. Shirley*, 181 S.W.2d 346, 347-348 (Tenn. 1944); 17 C.J.S., Contracts, §201 p. 1001.

Where the public welfare is involved, **corporations as entities apart from their employees, have a non-delegable duty to supervise agents** to protect the public. The leading authority is *State v. Louisville & Nashville Railroad*, 91 Tenn. 445, 19 S.W. 229 (1892). Ironically, the court of appeals below conclusively adopted the reasoning in *United States v. Armour & Company*, 168 F.2d 342, 344, n.2 (3rd Cir. 1948) in ruling consistently with those courts but departed from its own precedent in the instant case. *Continental Baking Company v. United States*, 281 F.2d 137, 151 (6th Cir. 1960). The rule has wide acceptance[9] and applies even if criminal mens rea is invoked. *United States v. Harry L. Young & Sons*, 464 F.2d 1295, 1287 (10th Cir. 1972). An objective impossibility prohibiting adequate supervision will not excuse liability.[10]

The courts below read only the self-serving and exonerating comments from two of respondent's responsible executive employees, and petitioner was left with this excerpt of testimony as the end-all on the subject of respondent's knowledge even though that very testimony

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8. *Caldwell & Company v. Lea*, 152 Tenn. 48, 272 S.W. 715 (1925); *Nashville Bank v. Hays*, 9 Tenn. 243 (1829); *Lawrence v. Morrison*, 9 Tenn. 444 (1830); *Dews v. Eastham*, 10 Tenn. 463 (1830).

9. *United States v. Hilton Hotels Corporation*, 467 F.2d 1000, 1004 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973); *United States v. Cadillac Overall Supply Company*, 568 F.2d 1078, 1090 (5th Cir. 1978), cert. denied, 437 U.S. 903 (1978); *Dollar S. S. Company v. United States*, 101 F.2d 638, 640 (9th Cir. 1939); *United States v. Thompson-Powell Drilling Company*, 196 F. Supp. 571, 574 (N.D. Tex. 1961); *United States v. Kemmel*, 160 F.Supp. 718, 720 (M.D. Penn. 1958).

10. *United States v. Y. Hata & Company*, 535 F.2d 508 (9th Cir. 1976), cert. denied, 429 U.S. 828 (1977); *United States v. Stern*, 535 F.2d 512 (9th Cir. 1976).

established admitted conduct (App. A111-114; A125-134) which proves facts which, when proven in all other like and similar cases, have always yielded liability on the part of the suspect entity.

The jury, firsthand, heard the proof offered through the two executives and, after proper and unchallenged instruction on the law, found the proof from the two executives to convince that respondent, as an entity, was liable. In practical effect, the rulings below make it impossible for a borrower to prove that a national bank is liable for usury under §86; therefore, again, in terms of practical effect, the rulings below judicially repeal §86.

The prime rate fraud claims of petitioner were lost to a directed verdict because the district court, affirmed by the court of appeals, applied standards with respect to the **intent required to violate the mail fraud** statute which are inconsistent with the law.

The district court explicitly articulated that the term "prime rate" was "unfair" to petitioner, created problems in that it was impossible for any borrower to "figure out" what the prime rate was from the loan contract In spite of this, the district court directed a verdict, on the premise that it was impossible for petitioner to prove mail fraud, because the one responsible must have a "criminal intent to violate the law" which was as "something wicked, unlawful and deliberate" and an "intent to deceive" and an **"intent to injure"** (App. A83-85).

The district court complicated this ruling by holding that petitioner must prove not just that respondent, as an entity, possessed the requisite intent but that specifically identified agents of respondent, individually and personally, acted with such an intent. The district court explicitly held that, if the respondent's responsible agents were "men [who] thought they were doing the right

thing" and/or believed they were "supposed to" do what they did, it becomes impossible to prove that respondent, as an entity, had the necessary intent to violate the mail fraud statute (App. A84).

The court of appeals let stand the ruling of the district court and stated little more than a truism, without further explanation, that mail fraud requires "intentional fraud" which is "intentionally practiced" and which "requires intent to deceive" (App. A14).

This Court, since 1959, has handed down rulings with respect to various aspects of mail fraud on five separate occasions[11] and, in a seminal ruling, once in times passed in *Durland v. United States,* 161 U.S. 306 (1896). One of the more recent cases is of particular importance here. This Court passed up the opportunity to rule on this subject in that case because the proof supported the more rigorous intent conceptualization; thus, nothing this Court could say on the subject would change the result in that case. However, important here is the language where this Court stated as follows in *United States v. Lane,* 474 U.S. 438 (1986) at 453:

> [17] The Lanes argue that the Government must show that the charged mailings were specifically intended to lull, rather than showing simply a **general intention** on their part **to defraud,** in order to come within *Sampson's* holding. We need not determine whether any such **specific intent** must be shown, as we agree with the Court of Appeals that there was sufficient

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11. *McNally v. United States,* 483 U.S. ....., 107 S.Ct. ....., 97 L.Ed.2d 292 (1987); *United States v. Lane,* 474 U.S. 438, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986); *Mariscal v. United States,* 449 U.S. 405, 101 S.Ct. 909, 66 L.Ed.2d 616 (1981); *United States v. Maze,* 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974); *United States v. Sampson,* 371 U.S. 75, 83 S.Ct. 173, 9 L.Ed.2d 136 (1962); *Parr v. United States,* 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960).

evidence for the jury to infer **specific intent** to lull here under these instructions, which the Lanes did not challenge on appeal or in their cross-appeal.

In the instant case, unlike the *Lane* case, petitioner was denied the opportunity to have the evidence considered by the jury because of the clearest possible ruling of the district court that the most rigorous standards for specific criminal intent on the part of identified agents of respondent was not, in the opinion of the district court, shown by the proof. This issue would not seem capable of being more clearly crystalized and appropriate for ruling by this Court than as is presented by this case.

The question of the kind and quality of intent, if any at all, required to be liable for mail fraud is one of importance and to which society is in need of a soon answer. The problems created by not having an answer are growing in volume and intensity. The statistics clearly indicate that mail fraud is one of the, if not the most, frequently used statutes to support criminal prosecutions in the federal courts.[12] Added to this is the modern-day reality that mail fraud is used as the predicate offense in many, if not most, civil RICO claims. At present, there is a diversity of interpretations among courts at all levels and, even, within the various circuits.

This Court, in 1878, left it without doubt that the mail fraud statute made criminal conduct other than common law fraud and had elements less rigorous than common law fraud. Though somewhat slow in coming, this precept is taking on new prominence because, among other reasons, mail fraud is gaining even wider usage than in the past. A recapitulation of the diverse au-

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12. Rakoff, *The Federal Mail Fraud Statute (Part 1)*, 18 Duq.L.Rev. 771 (1980); Hurson, *Limiting the Federal Mail Fraud Statute - A Legislative Approach*, 20 Am.Crim.L.Rev. 423 (1983).

thority on this subject was recently published in the opinion and dissenting opinion in *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 530-534 (9th Cir. 1987). Also see *Deaver v. United States,* 155 F.2d 740, 744 (D.C. Cir. 1946) saying: "Similarly, a 'scheme' may be fraudulent though no misrepresentation is made." [citing *Kaufmann v. United States,* 282 F.2d 776 (3rd Cir. 1922), cert. denied, 260 U.S. 735 (1922)].

Likewise, see the thoughtful analysis in *United States v. Frankel,* 721 F.2d 917 (3rd Cir. 1983) saying at 921: "Schemes to defraud come within the scope of statute even absent a false representation."

Another informative recent statement appears as follows in *Armco Industrial Credit Corporation v. SLT Warehouse Company,* 782 F.2d 475 (5th Cir. 1986) at 481: "By confusing mail fraud with common law fraud, SLT's argument falls wide of the mark. . . . [T]o find a violation of the federal mail fraud statute it is not necessary that the victim have detrimentally relied on the mailed representations (citation omitted). Indeed, the intended victim need not even have been defrauded for liability to attach under the mail fraud statute." (citation omitted).

It is equally well established that the mail fraud statute imposes some affirmative duty on the part of one making representations. That is, a person who, though confused, ignorant or mistaken about information, makes a representation about the subject concerning which he is confused at his own risk and, if what is represented deceives or has the potential to deceive or mislead, the recklessness of the person making the representation is taken as sufficient to establish intent. *United States v. Dick,* 744 F.2d 546 (7th Cir. 1984).

The court of appeals below has recently restated the very often repeated rule that a person uses the mail to

further any conduct which is not morally upright, irrespective of the form or the way in which such conduct manifests itself, is a violation. *United States v. Bibby*, 752 F.2d 1116 (6th Cir. 1985).

Innumerable cases use the term "specific intent" to describe the kind of intent which must be proven. However, in further explanation of what is meant by "specific intent," when so used, courts often provide a definition which makes the intent described more akin to general intent than specific intent. Typical of this is *Schreiber Distributing Company v. Serve-Well Furniture Company*, 806 F.2d 1393 (9th Cir. 1986).

In short, the question of what intent and how much of it is required by whom to violate the mail fraud statute is becoming more and more confused instead of more and more clarified. Only this Court can resolve this many-times recurring question, and, thereby, save hundreds upon hundreds of judicial hours.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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